

July 10, 2007

Mr. Jeff Bruette
128 Patriot Drive, Units 8-10
Middletown, DE 19709

Re: **Freedom of Information Act Complaint
Against Town of Middletown**

Dear Mr. Bruette:

On April 17, 2007, our Office received your complaint under the Freedom of Information Act, 29 *Del. C.* Ch.100 ("FOIA"), alleging that the Town of Middletown ("the Town") violated the open meeting requirements of FOIA by amending the agenda three days before a meeting scheduled for April 2, 2007 to include two matters of public business.

You provided us with a copy of the agenda for the Town Council's April 2, 2007 meeting. The revised agenda (posted on March 30, 2007) added for discussion: Item 14. "Public Hearing – Introduce an Ordinance authorizing the execution of a Memorandum of Understanding between Frog Hollow, LLC; Signature Golf Management, LLC and the Town of Middletown." The revised agenda noted that "[t]his item was not part of the original agenda which was previously posted on March 20, 2007. This item is being added to the agenda. The delay occurred because the Town just finalized review of the Memorandum of Understanding."

The revised agenda for the April 2, 2007 meeting also added as Item 15: "Public Hearing – A motion to ratify a Tree Planting and Care Grant Contract between the Town of Middletown and

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the State of Delaware, Department of Agriculture Forest Service." The revised agenda noted that "[t]his item was not part of the original agenda which was previously posted on March 20, 2007. This item is being added to the agenda. The delay occurred as a result of the Town receiving the contract after the original agenda was posted."

By letter dated April 18, 2007, our Office asked the Town to respond to your complaint by April 27, 2007. Our Office received the Town's response on April 25, 2007. On June 4, 2007, our Office asked the Town for additional information which we received on June 7, 2007.

According to the Town, "Mr. Bruette is correct that the Town amended the agenda to include Items 14 and 15." The Town contends that FOIA authorizes a public body to amend an agenda up to six hours before a meeting if "the reasons for the delay in posting" are "briefly set forth in the agenda." 29 *Del. C.* §10004(d)(5). According to the Town, "[t]he agenda was amended three days prior to the scheduled meeting on April 2, 2007 (well beyond the 6 hour requirement). The amended agenda briefly states the reasons why these agenda items were not included as part of the original published agenda."

RELEVANT STATUTES

FOIA provides that "[a]ll public bodies shall give public notice of their regular meetings and of their intent to hold an executive session closed to the public, at least 7 days in advance thereof." 29 *Del. C.* §10004(e)(2).

FOIA provides that "[w]hen the agenda is not available as of the time of the initial posting of the public notice it shall be added to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda." 29 *Del. C.* §10004(e)(5).

LEGAL AUTHORITY

"‘An agenda serves the important function of notifying the public of the matters which will be discussed and possibly voted on at a meeting, so that members of the public can decide whether to attend the meeting and voice their ideas or concerns.’" *Att’y Gen. Op.* 05-IB11 (Apr. 11, 2005) (quoting *Att’y Gen. Op.* 03-IB22 (Oct. 6, 2003) (quoting *Att’y Gen. Op.* 97-IB20 (Oct. 20, 1997))).

"FOIA allows a public body to amend an agenda when it ‘is not available at the time of the initial posting of the public notice’ so long as it is added ‘to the notice at least 6 hours in advance of said meeting, and the reasons for the delay in posting shall be briefly set forth in the agenda.’" *Att’y Gen. Op.* 05-IB23 (Aug. 15, 2005) (quoting 29 *Del. C.* §10004(e)(5)).

Our Office has "cautioned that this exception does not authorize a public body to amend the agenda prior to a meeting for any reason, but rather applies ‘to add items that come up suddenly and cannot be deferred to a later meeting.’" *Att’y Gen. Op.* 05-IB15 (June 20, 2005) (quoting *Att’y Gen. Op.* 05-IB09 (Apr. 11, 2005)).

In *Att’y Gen. Op.* 05-IB15, the City Council amended the agenda the day before a meeting to add a proposed subdivision. The amended agenda stated that the "reason for delay in posting" this matter of public business was "due to late arrival of information." Because the City amended the agenda at least six hours in advance as required by FOIA, the "issue then is whether the City gave sufficient reason why it could not have included the subdivision in the agenda when it was originally posted on April 7, 2005." *Att’y Gen. Op.* 05-IB15. Our Office concluded there was no "evidence in the record that consideration of the proposed subdivision by the Council was such a pressing matter that it could not be deferred to a later date." *Att’y Gen. Op.* 05-IB15.

In *Att’y Gen. Op.* 06-IB08 (Apr. 6, 2006), the School District "did not receive the bid

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specifications from its construction manager (EDIS) until December 15, 2005 (five days before the scheduled December 20, 2005 public meeting). The School District needed to approve the bid specifications before sending them to prospective bidders on a project involving four separate contracts." If the School District "had not approved the EDIS bid specifications at its meeting on December 20, 2005, that would have delayed the construction project because the next regularly scheduled meeting of the School District was not until January 24, 2006." Under those circumstances, our Office determined that "there was a sufficient reason for the School District to amend the agenda five days before the December 20, 2005 meeting." *See also Att'y Gen. Op. 05-IB23* (Aug. 15, 2005) ("We understand that any delay in the approval of the change order could have resulted in a default on the contract, and that the Council was not scheduled to meet again until May 31, 2005.").

When a public body amends an agenda for a public meeting after its initial posting but at least six hours in advance of the meeting, our Office believes that the public body has the burden to show: (1) the matter came up unexpectedly after the initial posting; and (2) the matter of public business requires the immediate attention of the public body and cannot be deferred to provide seven day's notice to the public.

Our Office accepts the explanation in the revised agenda for the Town's April 2, 2007 meeting that Items 14 and 15 came up after the Town posted the original agenda on March 20, 2007. Based on the record, however, we do not believe that the Town has met its burden of proof that those items required immediate attention and could not be deferred to a later date.

"We recognize that the business of government does not stop seven days before a public

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meeting, but FOIA provides flexibility for a public body to amend the agenda up to six hours before a meeting to add items that come up suddenly and cannot be deferred to a later meeting." *Att'y Gen. Op.* 03-IB22 (Oct. 6, 2002). Our Office does not believe, however, that FOIA contemplates repeated or routine amending of agendas after their initial posting. Citizens should not have to double check the agenda over and over to see whether the public body has added any new matters of public business.

The Town contends that it should be free to amend an agenda at least six hours prior to a meeting whenever it likes because "a growing municipality such as Middletown faces a myriad of issues requiring Council's attention. Considering that the Town's meetings are only once a month, it is to be expected that the Town will need to periodically update the agenda to lawfully conduct municipal business in a timely manner."

If that is a problem, then there are other remedies. The Town Council could hold its regular meetings more often than once a month. Or the Town could post the agendas for its monthly meetings seven days in advance (rather than two weeks in advance, as for the April 2, 2007 meeting) to allow more time for new matters of public business to be included in the original posting of the agenda.

Our Office determines that the Town violated the open meeting requirements of FOIA by amending the agenda three days before the April 2, 2007 Council meeting without sufficient reason. "There is no evidence in the record that consideration of [Items 14 and 15] by the Council was such a pressing matter that it could not be deferred until a later date." *Att'y Gen. Op.* 07-IB10 (May 10, 2007).

We do not believe that the Town needs to remediate this FOIA violation. According to the

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Town, "no action was taken as this was merely an introduction of an ordinance authorizing the execution of a memorandum of understanding." The Town will have to take final action adopting the ordinance at a future public meeting. *See Att'y Gen. Op. 07-IB10* (May 10, 2007) (no remediation required because "the Town did not take any formal action on the proposed FOIA policy at the meeting of the Council on March 12, 2007").

In contrast, the Town acknowledges that the Council did take formal action and "ratify the tree planning and care grant contract" (Item 15 on the amended agenda for the April 2, 2007 meeting). The Town can remediate this FOIA violation by scheduling a meeting within thirty days of the date of this letter in strict compliance with the notice requirements of FOIA for new and substantial reconsideration of Item 15 on the agenda for the Council's April 2, 2007 meeting. We ask the Town Solicitor to write to our Office within ten days after remediation is completed.

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CONCLUSION

For the foregoing reasons, our Office determines that the Town violated the open meeting requirements of FOIA by amending the agenda three days before the Council's April 2, 2007 meeting to include discussion of two new matters of public business. The Town has not met its burden of proof to show why those matters of public business could not be deferred to allow seven days' notice to the public.

The Town can remediate this FOIA violation by scheduling a meeting within thirty days of the date of this letter in strict compliance with the notice requirements of FOIA for new and substantial reconsideration of Item 15 on the agenda for the Council's April 2, 2007 meeting. Our Office asks the Town Solicitor to write to us within ten days after remediation is completed.

Very truly yours,

W. Michael Tupman, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

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cc: The Honorable Joseph R. Biden, III
Attorney General

Richard S. Gebelein, Esquire
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Town Solicitor

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